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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 HAROLD D. HARDEN,

Case No. 2:14-cv-00377-APG-PAL

8 Plaintiff,

**ORDER**

9 v.

10 C. MONNINGHOFF, et al.,

(Mot. Compel – Dkt. #100)  
(Mot. File Am. Compl. – Dkt. #101)  
(Mot. Ext. Time – Dkt. #118)

11 Defendants.

12 This matter is before the Court on Plaintiff Harold D. Harden's Motion for an Order  
13 Compelling Discovery (Dkt. #100); Motion for Leave to File an Amended Complaint  
14 (Dkt. #101); and Motion to Extend Time (Dkt. #118). This proceeding is referred to the  
15 undersigned pursuant to 28 U.S.C. § 636(b)(1)(A) and LR IB 1-3 and 1-9.

16 Mr. Harden is a prisoner in the custody of the Nevada Department of Corrections, and he  
17 is proceeding in this case *pro se* and *in forma pauperis*. This case arises from his allegations,  
18 pursuant to 28 U.S.C. § 1983, that Defendants violated his civil rights. In count 1 of his  
19 Complaint, Mr. Harden alleges that Defendants violated the Due Process Clause of the  
20 Fourteenth Amendment by moving him to the prison mental health unit without notice or a  
21 hearing and against his objections. *See* Screening Order (Dkt. #16). Upon screening his  
22 Complaint, the Court determined that it stated a colorable claim for a due process violation. *Id.*

23 The Court stayed the case for 90 days to allow the parties an opportunity to settle their  
24 dispute through the Inmate Early Mediation Program before the filing of an answer or starting  
25 the discovery process. *Id.* However, the parties did not reach a settlement and the case was  
26 returned to the normal litigation track. *See* Order (Dkt. #34). On January 7, 2015, the Nevada  
27 Office of the Attorney General accepted service on behalf of Defendants Aguilar and  
28

1 Monninghoff (the “NDOC Defendants”). *See* Notice Acceptance of Service (Dkt. #36). The  
 2 NDOC Defendants filed their Answer (Dkt. #42) to the Complaint on February 17, 2015.

3 On July 15, 2015, the Court entered a Scheduling Order (Dkt. #79) directing that  
 4 “discovery in this action shall be completed on or before ninety (90) days from the date of this  
 5 Order, which is October 12, 2015.” *Id.* ¶ 3. The Scheduling Order also provided deadlines to: (i)  
 6 amend pleadings or join additional parties, September 14, 2015, and (ii) file discovery motions,  
 7 October 27, 2015. *See id.* ¶¶ 1–3.

#### 8 **I. MOTION FOR AN ORDER COMPELLING DISCOVERY (DKT. #100)**

9 In this Motion, Mr. Harden asks the Court to compel the NDOC Defendants to “fully  
 10 answer” his interrogatories. In their Opposition (Dkt. #105), the NDOC Defendants point out  
 11 that Mr. Harden filed this Motion over a month after the deadline to file discovery motions  
 12 provided in the Scheduling Order (Dkt. #79). The NDOC Defendants further assert that the  
 13 Motion should be denied because he failed to satisfy the meet and confer requirements. Mr.  
 14 Harden did not file a reply brief and the time for doing so has now run. The Court has  
 15 considered the Motion (Dkt. #100) and the NDOC Defendants’ Opposition (Dkt. #105).

16 A threshold issue in the review of any motion to compel is whether the moving party  
 17 made adequate efforts to resolve the dispute without court intervention. Rule 37(a)(1) of the  
 18 Federal Rules of Civil Procedure requires that the party bringing a motion to compel discovery  
 19 must “include a certification that the movant has in good faith conferred or attempted to confer  
 20 with the person or party failing to make disclosure or discovery in an effort to obtain it without  
 21 court action.” Similarly, LR 26–7(b) of the Local Rules of Practice provides that discovery  
 22 motions “will not be considered unless a statement of the movant is attached thereto certifying  
 23 that, after personal consultation and sincere effort to do so, the parties have not been able to  
 24 resolve the matter without Court action.” As a general rule, parties with discovery disputes are  
 25 required to conduct personal, two-way communication to attempt to resolve their disputes  
 26 without judicial intervention. *ShuffleMaster, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166,  
 27 171 (D. Nev. 1996). This “meet and confer” obligation promotes an open exchange between  
 28 litigants “to resolve issue by agreement or to at least narrow and focus matters in controversy

1 before judicial resolution is sought.” *Nevada Power v. Monsanto*, 151 F.R.D. 118, 120 (D. Nev.  
2 1993).

3 Mr. Harden’s Motion (Dkt. #100) is denied for multiple reasons. First, the Motion is  
4 untimely. The Scheduling Order required that the parties file any discovery motions no later  
5 than October 27, 2015. The Motion was filed on December 1, 2015, and provides no explanation  
6 for why it was not filed on time. Second, Mr. Harden does not identify the specific  
7 interrogatories he believes are deficient, nor does he attach the interrogatories or the responses to  
8 his Motion as required by LR 26-7. The purpose of the rule is to enable the court to determine  
9 whether the discovery requests and/or the responses are appropriate and comply with the  
10 discovery rules. The Court cannot determine whether the NDOC Defendants fully or  
11 appropriated responses without seeing the request and the responses claimed incomplete.

12 In addition, the Motion does not demonstrate that Mr. Harden met and conferred in good  
13 faith with the NDOC Defendants or attempted to do so as required by LR 26–7(b) and Rule  
14 37(a)(2)(B). Where one of the parties is an inmate, the Court does not require in-person  
15 meetings and allows the parties to meet and confer by telephone or by exchanging letters.  
16 Although the format of the meet-and-confer process changes, the substantive requirement  
17 remains the same-namely, the parties must engage in a good faith effort to meet and confer to  
18 resolve discovery disputes before seeking court intervention. Mr. Harden sent a letter to counsel  
19 for the NDOC Defendants on September 1, 2015, inquiring whether the NDOC Defendants had  
20 received his interrogatories. *See* Defs.’ Opp’n (Dkt. #105), Exhibit D. The NDOC Defendants’  
21 response indicates that it served its Answers to Interrogatories by mail August 31, 2015, and  
22 supplemental answers were served September 8, 2015. Copies of the answers and supplements  
23 are attached as exhibits to NDOC’s Response. The interrogatories were answered. No  
24 objections were made. Accordingly, the Motion is denied.

## 25 **II. MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT (DKT. #101)**

26 Mr. Harden requests leave of the Court to file an amended complaint because he has  
27 learned through discovery that an “unnamed employee” was involved in his placement in a  
28 mental health unit. The NDOC Defendants’ Opposition (Dkt. #114) asserts that his Motion

1 should be denied because it is untimely and Mr. Harden did not attach a proposed amended  
 2 complaint. The Scheduling Order (Dkt. #79) states that September 14, 2015, was the deadline to  
 3 amend pleadings or join additional parties, *id.* ¶¶ 1–2, and provides the following regarding  
 4 extensions of deadlines:

5 All motions or stipulations to extend any deadline set herein must be received by  
 6 the Court at least **twenty-one (21) days** prior to the expiration of the subject  
 7 deadline(s). Any request to extend filed less than twenty-one (21) days prior to the  
 expiration of the subject deadline must be supported by a showing of excusable  
 neglect, in addition to good cause.

8 *Id.* at 2 ¶ 7. Mr. Harden did not file a reply brief and the time for doing so has now run. The  
 9 Court has considered the Motion (Dkt. #101) and the NDOC Defendants’ Opposition  
 10 (Dkt. #114).

11 Rule 15 provides that a party may amend a pleading once “as a matter of course” within  
 12 21 days after serving it. Fed. R. Civ. P. 15(a)(1)(A). After that, a party may amend its pleading  
 13 only by leave of the court or with the opposing party’s written consent. Fed. R. Civ. P. 15(a)(2).  
 14 After the entry of a scheduling order, a request for leave to amend the pleadings is controlled by  
 15 Rule 16(b), rather than Rule 15(a). *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608–  
 16 09 (9th Cir. 1992); *see also Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP.*, 430 F.  
 17 Supp. 2d 1157, 1163 (D. Nev. 2006) (noting that after a court has entered a scheduling order, “a  
 18 request to amend the pleadings no longer is governed by Rule 15; rather, Rule 16 controls”).  
 19 Only if a movant establishes good cause to modify the scheduling order under Rule 16 does the  
 20 court consider whether amendment is proper under Rule 15. *See Johnson*, 975 F.2d at 609.

21 “Unlike Rule 15(a)’s liberal amendment policy which focuses on the bad faith of the  
 22 party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)’s  
 23 ‘good cause’ standard primarily considers the diligence of the party seeking the amendment.”  
 24 *Johnson*, 975 F.2d at 609 (good cause to extend a discovery deadline exists “if it cannot  
 25 reasonably be met despite the diligence of the party seeking the extension”). A party’s  
 26 carelessness cannot support a finding of diligence. *Id.* Although the court may consider other  
 27 factors, if the moving party was not diligent in seeking to modify a scheduling order, “the inquiry  
 28

1 should end.” *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294–95 (9th Cir. 2000) (citation  
2 omitted).

3 In addition to showing good cause, a party must also establish that its failure to act was  
4 the result of excusable neglect. *See* LR 26-4(a) (a request to extend a scheduling order deadline  
5 made less than twenty-one days before expiration of that deadline must be supported by a  
6 showing of excusable neglect in addition to the good cause required by LR 6-1 and Rule 16).  
7 Excusable neglect exists where a party’s failure to comply with a deadline was negligent. *See*  
8 *Lemoge v. United States*, 587 F.3d 1188, 1195 (9th Cir. 2009).

9 Here, the Motion (Dkt. #101) does not address the reason for its untimeliness. Without  
10 explanation for the late filing, Mr. Harden cannot satisfy the good cause standard or establish  
11 excusable neglect. But even if he had done so, Mr. Harden also failed to submit a proposed  
12 amended complaint. When seeking leave to amend a pleading, LR 15-1 requires the moving  
13 party to “attach the proposed amended pleading to any motion to amend so that it will be  
14 complete in itself without reference to the superseding pleading.” The Court cannot grant leave  
15 to amend without examining a proposed amended complaint. The Motion is therefore denied.

### 16 **III. MOTION FOR EXTENSION OF TIME (DKT. #118)**

17 In this Motion, filed December 28, 2015, Mr. Harden does not specifically state what  
18 deadline he wishes to extend. Although his request is unclear, it appears he may be seeking  
19 additional time to respond to the NDOC Defendants’ Motion for Summary Judgment and to  
20 allow the Court to issue a ruling on his motions for leave to amend and for appointment of  
21 counsel. However, Mr. Harden filed an Opposition (Dkt. #117) to the summary judgment  
22 motion on December 29th. If Mr. Harden wanted an extension of time to oppose the summary  
23 judgment motion, his request is now moot.

24 The Motion may also be seeking an extension of discovery. Mr. Harden argues he has  
25 not had time to seek discovery on or about Dr. Grant Lee. The Scheduling Order (Dkt. #79)  
26 states that discovery would close on October 12, 2015, and notes the following regarding  
27 extensions:

28 All motions or stipulations to extend discovery deadlines shall include:

- (a) A statement specifying the discovery completed by the parties of the date of the motion or stipulation;
- (b) A specific description of the discovery which remains to be completed;
- (c) The reasons why such remaining discovery was not completed within the time limit of the existing discovery deadline; and
- (d) A proposed schedule for the completion of all remaining discovery.

*Id.* at 2 ¶ 7. The good cause and excusable neglect standards apply to all requests for extensions of discovery deadlines.

Mr. Harden filed this Motion more than two months after the close of discovery. The Motion does not establish either good cause standard or show excusable neglect. The Motion also fails to state the specific discovery that Mr. Harden needs to complete regarding Dr. Grant Lee or propose a schedule to complete such discovery. The Court therefore denies the Motion.

Accordingly,

**IT IS ORDERED** that Plaintiff Harold D. Harden's Motion for an Order Compelling Discovery (Dkt. #100); Motion for Leave to File an Amended Complaint (Dkt. #101); and Motion for Extension of Time (Dkt. #118) are **DENIED**.

Dated this 20th day of January, 2016.

  
PEGGY A. ZEEN  
UNITED STATES MAGISTRATE JUDGE